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FILED
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No. 82-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

STATE OF NEVADA'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

We submit that the QUESTION PRESENTED by the Pyramid Lake Paiute Tribe of Indians is not posed by the record in this case. The only QUESTION PRESENTED insofar as the Tribe is concerned is whether the Ninth Circuit Court of Appeals correctly affirmed the findings of the District Court that (a) the United States properly represented the Tribe's interests, and (b) the Tribe has never questioned the good faith or motives of the United States in these proceedings.

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1. The Petition is a Conditional One.

At the outset, it should be emphasized that the Cross-Petition of the Pyramid Lake Paiute Tribe of Indians (the "Tribe") is a conditional one (Cross-Pet. p. 19). The Tribe seeks certiorari only in the event that the Court grants the Petition of the State of Nevada (No. 81-2245) and/or that of the Truckee-Carson Irrigation District ("T.C.I.D.") (No. 81-2276).

2. Due Process is Not An Issue.

Although the body of the Tribe's Cross-Petition is peppered with references to an alleged denial of due process of law, the Question Presented makes no reference to due process, to the United States Constitution, or to any Article or Amendment thereof. Petitioner is therefor precluded from arguing a constitutional principle.

Rule 21.1(a) of the Rules of this Court.[1] The record presents none of the exceptions to this Rule noted in Stern & Gressman, *Supreme Court Practice* (5th ed.), pp. 456-461, and the cases there cited. Nevertheless, because the Court may choose to address due process, we show below why the record in this case does not properly present such an issue.

First, it is important to understand precisely what the Ninth Circuit held. It noted that the Tribe was entitled to due process (Nevada App. p. 232a). Contrary to the Cross-Petition, however, the court specifically declined to find the Government's representation improper or inadequate (Nevada App. pp. 237a-238a). That could have ended the matter, since the Tribe's fundamental rights were not denied. Nevertheless, out of an abundance of caution, the court proceeded to an alternative holding. It assumed for purposes of argument, but did not decide, that the United States had been a faithless fiduciary. The court then proceeded to address the question of the knowledge of the *Orr Ditch* defendants as to the claimed impropriety. It found that they had no such knowledge, and the court therefore followed the general rule, except as to T.C.I.D., that representation by the United States will bind an Indian tribe and its individual members (Nevada App. p. 236a).

In this regard, it must be remembered that neither the Government nor the Tribe had ever challenged the District Court's Finding of Fact that even if there was some impropriety in the Government's representation (which the District Court specifically found not to exist), it was unknown to the *defendants* in the *Orr Ditch* case (Nevada App. p. 238a). The Ninth Circuit, after re-

[1] The Tribe presented essentially the same issues to the Ninth Circuit as it has to this Court. In the ISSUES PRESENTED FOR REVIEW to the Circuit Court, as here, no mention was made of a constitutional question. See Brief of Appellant Pyramid Lake Paiute Tribe of Indians, Ninth Circuit, p. 1.

viewing the record relating to that Finding on its own initiative, did not find it clearly erroneous (Nevada App. p. 238a).

Thus, though the Ninth Circuit, for analysis purposes only, approached the case in the alternative as if the United States might have been guilty of fraud or collusion, the court never overturned the trial court finding that the good faith or motives of the government counsel were not questioned by the United States or the Tribe in this proceeding.[2] Therefore, the record below does not support any claim that the United States was a faithless fiduciary or chargeable with fraud or collusion. Quite the contrary is true.

The Tribe nevertheless appears to contend that *it* was without knowledge of the *Orr Ditch* proceeding and of the fact that its water rights were to be determined therein. The first response is that this argument addresses only the Ninth Circuit's *alternative* holding, as outlined above. The second, and even more important response, is that the record wholly refutes the Tribe's factual premise:

(a) Exhibit A16, admitted into evidence, contains answers by the Tribe in response to requests for admissions propounded by the State of Nevada. The Tribe admitted

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[2] The trial court's Finding of Fact Number 29 reads as follows:

> The government lawyers in *Orr Ditch*, both departmental, agency and bureaus, as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of purpose or interest in carrying out the decisions and directions of their superiors in the executive department of government and the Tribe has not suffered any deprivation or denial of due process case to diminish or defeat the rights of the defendants acquired by the adjudication and the final decree in *Orr Ditch*. *The good faith or motives of said government counsel is not questioned by plaintiff and the Tribe in this proceeding.* [Nevada App. pp. 189a-190a; emphasis added.]

in Responses 19-20, 31, 34, 37 and 40 that during the course of the *Orr Ditch* proceedings, one or more of the Indians belonging on the Pyramid Lake Reservation were aware of the existence of the *Orr Ditch* case and were also aware that the interests of the Tribe were involved.

(b) In a Finding of Fact not disturbed by the Court of Appeals, the District Court determined that the Tribe had the actual and legal ability and capacity to intervene in *Orr Ditch* from the time of the filing of the complaint up to and including the entry of the Final Decree for the purpose of asserting an alleged fishery water right (Nevada App. p. 186a). The Tribe did successfully intervene in *Orr Ditch* on August 5, 1976 (Nevada App. p. 186a). The actual ability to intervene for purposes of asserting the right now claimed implies a knowledge of the case and the means to appear in its own right. Both implications are supported by the record. Also, the trial court finding that the Indians were aware of the decline of the fishery during the course of the litigation has never been challenged (Nevada App. p. 187a).

(c) Correspondence and tribal minutes admitted into evidence also show that the Indians were aware of the *Orr Ditch* case and that the Government was representing the Reservation interests. For example, Exhibit A464 contains correspondence between John Collier of Indian Affairs and Teddy James, Secretary of the Pyramid Lake Indian Council, discussing in part the *Orr Ditch* case and the fact that the Attorney General had been recently advised as to the particular interest of Mr. James in the per-acre duty of water for the Tribe fixed in the 1926 Temporary Restraining Order. Exhibit U259 includes minutes of a tribal meeting held February 8, 1934. During the discussion, the Chief wanted to know why the Government was not obtaining more water for irrigation for the Indians of the Reservation. Exhibit A10115d is made up of correspondence from the Superintendent of the Reservation to the Commissioner of Indian Affairs,

attaching minutes of a Pyramid Lake Indian delegation, which was seeking more responsive representation by the Government. For additional examples, see pages 11-14 of the City of Reno's Brief before the Ninth Circuit, printed as Appendix A hereto.

(d) During the course of the *Orr Ditch* litigation, the Tribe contracted with its own independent counsel to deal with an unrelated issue (Ex. U259, Transcript Vol. 43, pp. 8727-29).

(e) In 1943, the Tribal Chairman, the Secretary of the Tribe, and Commissioner of Indian Affairs Collier appeared before the House Committee on Indian Affairs. They had with them the *Orr Ditch* Temporary Restraining Order (see Nevada App. pp. 122-162), and they discussed the water rights decreed by the court for the Reservation (Exhibits U-543 and A-605).

In short, the Tribe had actual knowledge of the *Orr Ditch* case, as well as knowledge that the Lake and the fishery were declining, knowledge of the claim that the Tribe was entitled to the earliest right on the river, and knowledge that the United States was representing its interests in water rights. Even though the Tribe had the actual and legal ability to intervene during the course of the *Orr Ditch* proceedings, it did not choose to do so until the trial of this case was at an active stage.

Thus, for each of the reasons cited above, the Tribe has totally failed to undermine the Ninth Circuit's ruling below.

3. The Tribe's Position is Fatally Inconsistent.

The Tribe takes inconsistent positions in regard to what it knew or was responsible for knowing at the time of the *Orr Ditch* litigation. On the one hand, it claims that it did not participate in, and was not consulted about, the litigation (Cross-Pet. pp. 4-5). The implication seems to be—although the Tribe avoids saying

it directly—that the Tribe was so unaware of the litigation that it was not able to protect its rights. On the other hand, the Tribe argues that "the government's actual representation of the interests of both the Pyramid Lake Reservation and the Newlands Reclamation Project was apparent on the face of the *Orr Ditch* Amended Complaint" (*id.* at p. 14 n. 8), that "the government's conflicting legal responsibilities to the Tribe and to the Newlands Project water users are based on public laws and are manifested in judicial decisions" (*id.*), and that the *defendants* in *Orr Ditch* were "chargeable with knowledge of the public laws defining the government's obligation to the Indian tribes and reclamation projects" (*id.* at p. 12 n. 6). It is difficult to understand how the defendant water users can be charged with public knowledge of all aspects of the *Orr Ditch* litigation, both from the complaint and from laws and judicial decisions, and yet the Tribe is to be treated as somehow not responsible for knowing the same public facts.

4. Another Contemporaneous Related Case Supports the Fact Finding Now Challenged.

There is substantial evidence to support the lower court's determination that any impropriety in the Government's representation was unknown to the defendants in *Orr Ditch*. The Tribe argues that the failure of the United States to assert a fishery claim for the Reservation was due to a conflict of interest within the United States. However, the evidence showed that it was unlikely that the United States would have asserted a fishery water right even if it had not also been representing the Reclamation Project interest. The contemporaneous *Walker River* case, *United States* v. *Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935), involved a claim for *Winters* rights on the Walker Lake Indian Reservation, based upon the same series of letters and orders in 1859 and the Executive Order of President

Grant issued in 1874 as are involved in the instant case.[3] In *Walker River*, there could have been no conflict of interest because the United States represented only the interest of the Indian Reservation; no reclamation project or other interest was asserted. Nevertheless, the Government did not assert a fishery water right in that case, even though, had the Government believed such a claim had merit, there was no alleged conflict of interest to prevent the assertion of such a claim. Thus, the *Orr Ditch* defendants had further reason for not questioning the appropriateness of the Government representation in the *Orr Ditch* case.

The trial court was presented with no evidence in the record below of any *Orr Ditch* defendant recognizing the possibility of a *Winters* right for fishery purposes. It should not lightly be assumed that a desert lake that had been shrinking since prehistoric times would receive a federal water right for fishery and lake maintenance purposes, particularly when the thrust of national policy at the time was to reclaim the otherwise useless arid lands to the West and to develop Indian agricultural pursuits.

Despite the *Walker River* ruling that there was no *Winters* right for an Executive Order reservation, the United States in the *Orr Ditch* case nonetheless pressed for and achieved through the Truckee River Agreement a greater *Winters* water right for the Tribe than had been established in the 1926 Temporary Restraining Order. The Truckee River Agreement was executed after the *Walker River* District Court decision but before its reversal. The *Orr Ditch* defendants could only have concluded that the Tribe was receiving able representation by the United States and that the Tribe had obtained,

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[3] The holding that there was no *Winters* right for an Executive Order reservation was reversed by the Ninth Circuit Court of Appeals. 104 F.2d 335 (1939).

through such representation, a full and fair opportunity to be heard.

5. The Decision As To The Orr Ditch Defendants Below Does Not Conflict With Any Decision of This Court.

The State of Nevada does not contend that any of the due process cases cited by Cross-Petitioner were wrongly decided. However, none of these cases addresses the special relationship that exists between the United States and Indian tribes. Though *Hansberry* v. *Lee*, 311 U.S. 32 (1940), does address representative litigation, and is a leading class action decision, it does not displace *Heckman* v. *United States*, 224 U.S. 413 (1912), as the leading case dealing with the representation of Indian tribes by the United States. Even in *Hansberry*, however, the Court recognized (p. 43) that non-parties were to be bound where, because of the nature of the relationship between the party and non-party, the party is legally entitled to stand in judgment for the latter. Thus, under either *Heckman* or *Hansberry*, the actions of the United States in the *Orr Ditch* litigation require the res judicata effect which has been given the *Orr Ditch* Final Decree.

The logical extension of the Tribe's *Hansberry* interpretation would lead to an untenable result. If the Tribe has been denied due process, and the *Orr Ditch* Decree is wholly ineffective as to the Tribe's interests, then the Tribe becomes an indispensable party in any like litigation commenced by the United States (see F.R.C.P. 12b (7) and 19(b)). Because of tribal sovereign immunity, the United States would be unable to litigate federal property rights and those of Indian tribes without the consent, approval and intervention of the Indian tribe. The constitutional plenary power over the Indian tribes would therefore be meaningless in such a case. Though the courts have been appropriately lenient in allowing the intervention of Indian tribes, those cases deal with prospective representation. However, the case at bar is retrospective and the then apparent authority of the United States should not be nullified.

6. The Tribe's Other Contentions.

None of the Tribe's other contentions in its Cross-Petition has merit or warrants review by this Court.[4]

For example, the court below discussed in detail the Tribe's "different cause of action" argument, based on the "same evidence" test, and for good reasons rejected it (Nevada App. pp. 224a-226a). The various tests for determining whether there is a same cause of action for res judicata purposes were thoroughly briefed by all concerned. In addition to the "same evidence test", the "impairment of right" test set forth by then Judge Cardozo supports a finding of the same cause of action. *Schuykill Fuel Corp.* v. *B & C Nieberg Realty Corp.*, 250 N.Y. 304, 165 NE 456 (1929). The "operative facts" test supports the same finding. *Dery* v. *Wyer*, 265 F.2d 804 (2d Cir. 1959); *Rhodes* v. *Jones*, 351 F.2d (8th Cir. 1965). Also, the "primary right and duty" test produces the same result. *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927).

The Tribe's argument boils down to a claim that only one of the many tests for the same cause of action should have been applied, and that both courts below misapplied

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[4] There is no validity, for example, to the Tribe's argument (Cross-Pet. p. 18) that post-1944 appropriators of Truckee River water should not be bound by the *Orr Ditch* decree. The District Court found as a fact that all defendants herein are "successors in interest of or were then and are now in privity with the defendants in the *Orr Ditch* proceedings" (Nevada App. p. 188a). The Court of Appeals held that the United States framed its complaint in the broadest possible way so as to include all Truckee River waters, and subsequent appropriators reasonably relied upon the finality of the *Orr Ditch* Decree (Nevada App. pp. 239a-240a). The lower courts' findings and conclusions of law in this respect are fully supported by the authorities. *E.g.*, *Fowler* v. *Wolff*, 479 F.2d 338 (8th Cir. 1973); *Gambocz* v. *Yelencsics*, 468 F.2d 837 (3d Cir. 1972).

the "same evidence" test. No review by this Court is merited on this point.[5]

CONCLUSION

Thus, we have here a situation in which the United States represented a number of interests, including those of the Tribe, during the *Orr Ditch* proceeding. United States officials were fully aware of the Tribe's asserted need for water rights for fishery purposes.[6] And the Tribe, in turn, was fully aware of the *Orr Ditch* litigation. To the extent that the Tribe's needs conflicted with the need for irrigation under the Newlands Project, the United States made a deliberate decision, pursuant to Congressionally-dictated policy, to pursue the Newlands Project. To allow the Tribe and/or the United States to assert now what amounts to a superior right for the Tribe—because the amount of available water will not accommodate the needs of both the Tribe and the decreed rights—would not only thwart the long-established ju-

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[5] The burden of proof point raised by the Tribe (Cross-Pet. pp. 11-12, n. 6) has no merit. The *Orr Ditch* defendants had the burden of proof to make a prima facie res judicata case, which they did. The United States and the Tribe then contended that even if all of the elements of res judicata were present, that doctrine should not be applied if the Tribe's claim could be superimposed on the river and not harm the other right holders. The trial proceeded for weeks with evidence relating to "no harm". Nevada's Brief before the Ninth Circuit at pages 53-60 discussed the great harm that would result if the Tribe's claim was granted. The reason the burden of proof issue was raised on appeal was that the trial judge did not make a fact finding that harm would result if the Tribe's claims were granted. Instead, the trial court ruled that the plaintiffs had failed in their burden of proof to show no harm (Nevada App. p. 191a). There was no error.

[6] The Tribe concedes as much: "Government officials were aware of the potential claim of a water right to maintain and preserve the Tribe's Pyramid Lake and Truckee River fisheries [at the time of the *Orr Ditch* litigation]" (Cross-Pet. p. 5).

dicial decree [7] but ignore the deliberate decision of the Tribe's representatives at the time of the *Orr Ditch* litigation. Moreover, to declare that the Tribe was denied due process would be to conclude that the United States is incapable of fully representing the Tribe's interests, which has never been the law.

Thus, the Tribe's Petition is wholly without merit. We respectfully suggest that the Petitions filed by the State of Nevada (No. 81-2245) and T.C.I.D. (No. 81-2276) be granted, and that the instant Petition filed by the Tribe be denied.

Respectfully submitted,

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[7] The Tribe admits that, "On res judicata, the court of appeals first affirmed the district court's holding that the fishery water right was encompassed in the government's *Orr Ditch* cause of action" (Cross-Pet. p. 8). The Tribe also admits that, "The government, the other *Orr Ditch* parties, and the *Orr Ditch* court intended to make the adjudication as comprehensive as possible" (*id.* at p. 17 n. 11).

APPENDIX A

City of Reno Brief before the Ninth Circuit, pp. 11-19

* * * Awareness of the *Orr Ditch* litigation on the part of the Tribe is demonstrated by the documents which quote or relate to statements of the Pyramid Indians. Some examples are:

1. About February 12, 1913, "W.T. "Billy" Roberts, "a leading member of the Piute Tribe" (at Pyramid) stated to a newspaper reporter:

   "They want the government to put a concrete dam . . . on the Truckee river near the reservation and widen the ditch so the farmers on the west side of Pyramid Lake can get more water."

   "The government builds the Derby dam and Lahontan Dam and takes all land and gives to the white people but don't give a dam for us . . ." And it was reported:

   "The Indians raised the money to send Billy to Washington to plead their cause." Exh. U-62, p. 2; see: Exh. U-61.

2. On January 20, 1925, Abraham Mauwee, in a statement transmitted to Commissioner of Indian Affairs, said:

   ". . . must have water to save their fish; that is our water and should be turned down to us."

   "We are under the Government and the Government should protect our rights to this water, and not allow the water taken away from us." Exhs. U-169; A-101150; U-170, p. 1.

   Furthermore, on January 20, 1925, this Indian delegation stated:

"We want you (Superintendent Jenkins) to see the U.S. Attorney and see if notice cannot be served to make these people (squatters) to stop interfering with water that by right should go to the reservation." Exh. U-170, p. 2.

3. On February 7, 1930, Dave Gibson, the appointed Tribal representative, wrote to the Commissioner of Indian Affairs stating, amongst other things, that the Indians want a higher dam in the Truckee River on reservation; he said:

"Our greatest need is water for irrigation . . . It is, of course, advisable, to have such water rights as we are entitled to, properly adjusted, as such pertains to the Truckee River, as well." Exh. U-229.

4. About December 5, 1931, "Senator Lynn J. Frazier, Chairman of the Senate Indian Committee," received "a complaint of the Indians at Pyramid Lake" wherein it is stated that the Indians petition:

". . . We feel that from the Truckee River we are entitled to water to irrigate 3500 acres of land . . ." Exhs. A-50172B/U-238.

[The *Orr Ditch* temporary restraining order allocated to the Indians a certain amount of water to irrigate 3130 acres of land pursuant to Claim No. 1. Exh. A-99002, p. 9.]

5. Pyramid Indians on February 8, 1934 were initiating the process to form their self-government and one of the first items discussed by a member of the Tribe during the meeting was ". . . why the Government does not give more water for irrigation to the Indians of this reservation." Exh. A-456; 24 Tr. 4444-4446.

6. In a letter to Commissioner Collier, July 9, 1934:

"The Indians of Pyramid Lake Reservation are hoping that they can get an investigation of their water rights . . ."

"They are supposed to have the first right on the Truckee River since the year 1859, when at that time 58.7 second ft. of water was given them for their use . . ." (Statement of Pyramid Indian Council) Exh. A-458.

7. In a letter to Commissioner Collier, July 26, 1934:

". . . we were allocated first rights to 58.7 cu. ft. per sec. of water . . . water master on the reservation attempting to adjust the matter and is going tomorrow to Reno for another conference wtih the Nevada Water Master. . ." (Statement of Tribal Council) Exh. A-459.

8. Tribal Minutes, July 13, 1936:

". . . regarding the upstream storage on the Truckee River. A letter to made up was approved, this petition to cover our water right and to request that certain amount of water be . . . for Pyramid Lake year around." Exh. U-259.

9. Tribal Minutes, February 8, 1938:

"A suggestion concerning fish propogation was discussed. . . A stream of water sufficient enough year around; . . . The members emphasized their feeling toward the 'Old Water Right.'" Exh. U-259.

10. Tribal Minutes, August 6, 1940:

"The meeting was turned over to the Irrigation Supervising Engineer of San Francisco, California. Mr. Portier asked the Councilmen to consider a proposed project of changing the course of the river flow and to raise the water to its original level.

"Maps were shown to the tribe present at the meeting indicating the course the water would have. Individual ranchers we considered who were directly involved in plan. After much deliberation the Council approved the proposed plan.

"Mr. Winnemucca made a motion that the Council approve the plans because it would save the lands and also possible change to develop pasture on the east shore of the lake. Mr. Mauwee seconded the motion. The motion was carried."

"Mr. Rhodes motioned that estimate funds proposed for irrigation during fiscal year 1942 be approved . . . Water Master . . . $400.00." Exh. U-259 [See minutes for formal Tribal approval of plan—next page of exhibit.] [A contract for approximately $100,000 was let for this project. Exh. U-326, p. 1.]

11. Tribal Minutes state that on April 29, 1943, the Tribal Council authorized two Tribal delegates to travel to Washington, D C., to represent the Tribe at a Congressional hearing. One of those authorized to appear was the Chairman of the Council, Mr. Aleck. Exh. U-259. He testified that the Tribe had "no fish at all" and that the fishing had "died out" and that he did not want Pyramid Lake to fill up because that would "take half our irrigated pasture." Also, the thrust of the testimony of both Tribal delegates before the Congressmen was that the Tribe wants to be farmers and herdsmen. Exh. U-543, pp. 26-34 [See: pp. 33-34; p. 28 and p. 35.]

Another statement to the House of Representatives Committee in May of 1943 was:

"There is more water than the land we have. The water decree includes . . ." (Albert Aleck, Chairman of Tribal Council) Exhs. A-605, p. 28; U-543,

p. 28; [This Congressional hearing pertained to a proposed land bill to transfer some farm land to white entrymen.]

12. Tribal Minutes, June 12, 1944:

"Motion made by Mr. Francis Davis to adopt a resolution authorizing the payment of $265 to pay for water rights for irrigation on the Pyramid Lake Indian Lands as present by bill by the United States District Court of Nevada." Exh. U-259.

The above statements, including many others we have not specifically mentioned, prove the Indians and their Council had a sophisticated knowledge of the *Orr Ditch* litigation. They knew about their water rights granted under the Temporary Restraining Order of 1926, and they authorized payments to the Federal Watermaster. No doubt exists that they knew about the terms of the Truckee River Agreement of 1935 which, in substance, became the final decree in the *Orr Ditch* case. They also were aware of governmental actions with regards to the Newlands Project, and their irrigation projects. Coupled with these facts is the fact that they were aware that their water rights were dependent upon the *Orr Ditch* litigation. The Indians of Pyramid plainly told Congress in 1943 that the proposed *Orr Ditch* rights were to their satisfaction. * * *